BAKAR SALLEH

v.

HJ. ABDUL MALIK BAHADAN

HIGH COURT MALAYA, ALOR SETAR
KC VOHRAH J
[CIVIL SUIT NO. 43 OF 82]
28 DECEMBER 1990

EVIDENCE: *Ancient document - 48 years old - Genuineness - Jawi - Purported power of attorney - Objection as to admissibility - Discretion of Court - Due care and caution - Question of custody of document - Authenticity of execution - Evidence Act 1950, s. 90.*

The plaintiff B, as administrator of the estate of his deceased father, S, prayed for a declaration that the defendant H as administrator of the estate of L, held the property in trust for the estate of S. There was also a prayer for specific performance of an 'agreement'.

B alleged that S had bought the land from L and an agreement was produced to verify his allegation. The said document was allegedly made on 6 June 1942 and purported to be a power of attorney (PA) whereby S was said to be the donee of the said land and that L had sold the said land to S. The PA was initially kept by S, then S's wife and finally B.

The issue was the genuineness of the agreement as "an ancient document" under s. 90 of the Evidence Act 1950 and whether it could be presumed that it was executed by L, and, if so, whether a statement in the document where L admitted he had sold the land for RM60 to S afforded corroboration of the evidence of B that L had sold the land to S for RM60.

Held:

[1] In exercising the discretion vested in the Court under s. 90 of the Evidence Act 1950 the Court had to exercise due care and caution, as has been pointed out in *Ghulam v. Allahdin*.

[2] The custody of the document was proper custody under s. 90 of the Act as the document was produced by B, who said that the document had been initially in the possession of S, then S's wife and finally, B.

[3] After considering the evidence, there was no doubt that the document was made 48 years ago in 1942 and further that the custody of the document was proper custody within the meaning of s. 90 of the Evidence Act. Considering its honest face and that it was produced from proper custody, there was a presumption under s. 90 of the Act that the document is genuine.

[4] As the document was registered as a power of attorney and was accepted as such and properly and officially stamped, it is reasonable to infer that the indistinct mark of ink on one of the frayed edges of the paper under the adhesive tape is an indication that L did sign the document.

[5] The passage in the agreement by the donor L that he had sold the property to S for RM60 and that he had received the amount corroborates B's testimony as to the circumstances surrounding the sale of the land.

[Judgment for plaintiff.]

Cases referred to:
Ghulam v. Allahdin 19 IC 964
Jesu Lal v. Ganga Devi 20 IC 868

Legislation referred to:
Evidence Act 1950, s. 90

For the Plaintiff - E. Mayandi (Choe with him); M/s. Mayandi & Panjaram
For the Defendant - Kartar Singh Dhaliwal; M/s. Kartar Singh Dhaliwal & Co.

JUDGMENT

KC Vohrah J:

I gave judgment to the plaintiff in this case on 8 November 1989 and I now give my written reasons for it.

The issue in this case was whether on 6 June 1942 Lebai Madan agreed to sell and indeed did sell his share in a piece of land to Salleh bin Pit. Both persons have since died. In this suit, in para. 8(a) of his statement of claim, the plaintiff, as administrator of the estate of Salleh bin Pit prayed for a declaration that the defendant, as administrator of the estate of Lebai Madan, holds the property in trust for the estate of Salleh bin Pit and is bound to convey the same to the plaintiff, as administrator of the estate of Salleh. There was also the all important prayer under para. 8(b) for specific performance of the agreement allegedly made on 6 June 1942 and the prayer under para. 8(c) for costs.

The plaintiff's evidence was that his father bought the land from Lebai Madan. He said he remembered that Lebai Madan came to spend a night in his father's house and that that night Lebai Madan agreed to sell his land to his father for RM60. He said that Lebai Madan requested his father to go to the Pendang Land Office to execute an "agreement". He testified that Lebai Madan and his father went to the Land Office Pendang the next day and that his father came back in the afternoon with the "agreement" and the document of title to the land.

The "agreement" he referred to was produced in Court. It is a document which purports to be a power of attorney containing statements showing that Lebai Madan was donor of the power of attorney and that the father of the plaintiff was the donee in respect of dealings with regard to the disputed land. In this document there is a statement, supposedly made by Lebai Madan, that he, Lebai Madan, had sold the said land to "Md. Salleh" (the plaintiff's father) for RM60 and that he had received the amount.

Defence Counsel objected to the admissibility of the document on the ground that it is not a power of attorney which can pass muster under the Powers of Attorney Enactment of Kedah (Enactment No. 81) and under a provision of the state land law relating to powers of attorney in respect of land, both enactments being enactments existing at the time the document was purported to have been executed. With respect, the objection was misconceived as I was not concerned whether the document constituted a valid power of attorney at that time; the issue was its genuineness as "an ancient document" under s. 90 of the Evidence Act 1950, it being a document which appeared to be more than 20 years old, and whether it could be presumed that it was executed by Lebai Madan, and, if so, whether a statement in the document where Lebai Madan admitted he had sold the land for RM60 to Md Salleh afforded corroboration of the evidence of the plaintiff that Lebai Madan had sold the land to his father for RM60.

In exercising the discretion vested in the Court under s. 90 of the Evidence Act 1950 I was mindful that I had to exercise due care and caution, as has been pointed out in *Ghulam v. Allahdin* 19 IC 964; *Jesu Lal v. Ganga Devi* 20 IC 868.

The document, hand written in Jawi, appears yellow with age. It appears to have been kept folded and 3 creases breadthwise and 1 crease lengthwise show how the document was folded. These creases are creases which one normally expects of a document which has been kept folded over a long period of time. The 3 creases show in some places where the paper has given way; and adhesive tape has been gummed over and all along the creases to patch the parts where the paper has given way. Because of the translucency of the adhesive tape (presumably arising through passage of time) and the frayed edges of the paper under the tape, especially along the lower crease, what appear to be words or marks on the frayed edges cannot be deciphered. An English translation of the document shows several omissions where the words or marks are indecipherable and I will advert to this later.

On the top right hand corner is a 50c Kedah stamp and it has been cancelled by a circular imprint bearing the legend in English "State Treasury Alor Star" and within the circular imprint appears some indecipherable marks. The 50c stamp is perforated with the numbers "8 6 02" and is imprinted with the words "Dai Nippon". The perforated numbers "8 6 02" obviously indicate a date and this date corresponds with the date shown at the bottom left hand side of the document which bears this legend "Registered at Alor Star on this 8th day of 6th month, 2602 *vide* Power Attorney No. 5/02".

The date "8 6 02" or "8 6 2602" is a reference to the Siamese Calendar which was applicable in Kedah during the Japanese occupation. The year "2602" corresponds with the Muslim year 1361 and the Gregorian year 1942. I had no doubt that the document was made 48 years ago in 1942.

One would expect a document purporting to be a power of attorney to be in the custody of the donee. The document was produced by the plaintiff, the son of Salleh bin Pit. The plaintiff said that his father, the donee, had kept it and that when he died, his mother had kept it and that when she died, he took it into possession. To my mind the custody of the document was proper custody within the meaning of s. 90 of the Evidence Act 1950.

Considering its honest face and that it was produced from proper custody I could presume under s. 90 of the Evidence Act that the document is genuine.

At the place where one would normally expect a signature to be is a patched up part of the lower crease on the paper under the translucent adhesive tape and there is some indistinct mark of ink on one of the frayed edges of the paper under the adhesive tape. Considering that the document was properly stamped and that it was registered as a power of attorney in Alor Setar as "Power of Attorney No. 5/02" it is reasonable to infer that the said mark is an indication that Lebai Madan did sign the document.

As I had stated earlier I was not concerned whether the document constituted a valid power of attorney at the time it was executed. It was registered as a power of attorney and was accepted as such and properly and officially stamped and it is most improbable that it was not executed by the donor of the document. I could and I did presume that it was executed by Lebai Madan.

The presumption that I made was that the document was executed by Lebai Madan. In this presumed genuine document is that passage by the donor, Lebai Madan, that he had sold the property to "Md Salleh" for RM60 and that he had received the amount. This passage

corroborates what PW1 had testified as regards Lebai Madan agreeing to sell the land to his father for RM60 and that both his father and Lebai Madan had gone to the Pendang Land Office to execute an "agreement" as regards the sale of land. He called the document an "agreement" but it is clear that he, a simple villager, did not know the difference between an agreement and a power of attorney.

PW1 was not the best of witness. There were several discrepancies in his evidence but they were not material being related mostly to problems of recollecting matters of detail in regard to events which took place 48 years ago.

As for the defence, DW1, the sole witness, while asserting that her father did not sell the land to plaintiff's father in one breath confessed in the other that she did not know if plaintiff's father was the purchaser or tenant of the land. She said in answer to her Counsel that her father did not confide in her about the land. She said he did not tell her whether it was leased or sold to anybody. Her story that her father and mother were away from 1941 to 1945 in Johore is not believable bearing in mind that their children including herself (she was then 13) and her brother (less than 10) were left behind in Kedah supposedly to fend for themselves; she in fact agreed that her parents had to stay back to look after the children. Thus the pleading that the Lebai Madan did not execute the document because he was not in Kedah at the time of the execution of the document cannot be true.

On a balance of probabilities the plaintiff has proved his case. Apart from his own evidence of the sale and the corroboration of that from the document, the fact remains that the document of title was also in his possession and the fact remains that the quit rent relating to the land was paid throughout by his father (until his death), his mother (until her death) and himself.

In the circumstances I was of the view that the plaintiff had proved his case and I gave judgment to the plaintiff in terms of his prayers in terms of para. 8(a), (b) and (e) of his statement of claim.

Also found at [1991] 1 CLJ 500